

with, Andrew Allan, Damside, Water of Leith, Edinburgh, with consent and concurrence of the said Andrew Allan, were pursuers; and James Rae, Superintendent of the Dean Cemetery, Edinburgh, and residing there, was defender.

The issue was as follows:—

“Whether, on or about the 23d May 1867, and in or near the Dean Cemetery, Edinburgh, the defender assaulted the pursuer—to his loss, injury, and damage?”

Damages laid at £500 sterling.

For the pursuers it was alleged that Robert Allan and some other lads have been in the custom for some years of lighting a fire in celebration of the Queen's Birthday at the Water of Leith; and for this purpose they have been in use to collect brushwood and sticks from the Dean Cemetery, with the consent of the defender. On or about the 23d day of May last (1867), the pursuer, along with some other lads, had gone as usual to the Dean Cemetery for the purpose of gathering brushwood, with the aforesaid object. The permission which had been given them to do so had not been withdrawn, and they understood it to be continued. When the pursuer, Robert Allan, with the others, were about to gather the brushwood, they were chased off the ground and pursued by the defender; and as the pursuer was about to leave the Cemetery by dropping over the eastern boundary wall, at a place about 12 feet in height, the defender seized him by the legs, and pushed him over the wall, a height of upwards of 12 feet. By this fall the lower border of his under jaw, on the left side of his face, was severely cut, the left half of the jaw was broken, and displaced inwards nearly an inch, his forehead severely cut, both his knees were abraded, and his left wrist was seriously sprained. He was removed to the Royal Infirmary, and was under treatment there for upwards of a month. The features of the pursuer are and will continue to be deformed and disfigured, while his general health has been seriously affected.

The defender, on the other hand, denied that he ever consented to the pursuer or other lads collecting brushwood and sticks from the Cemetery. He admitted that, as it was his duty to prevent such depredations, he went to put a stop to them, when the pursuer and his companions ran off. He believed it to be true that in crossing the wall the pursuer fell upon the roadway outside the cemetery, and received some injuries; but the nature and extent of these were not within the knowledge of the defender, who denied all liability.

The jury unanimously returned a verdict for the defender.

Counsel for Pursuer—Mr Mackenzie and Mr Maclean. Agent—W. B. Glen. S.S.C.

Counsel for Defender—Mr Watson and Mr Macdonald. Agent—James Nisbet, S.S.C.

COURT OF SESSION.

Tuesday, January 7.

FIRST DIVISION.

HUNTER v. GRIEVE.

(Ante, vol. iv. 237.)

Reparation—Loss of Life—Fault of Deceased—New Trial. Motion for a rule, on the grounds (1) of want of evidence of fault on part of defender,

and (2) that deceased materially contributed to cause his own death, *refused*.

Archibald Hunter, potter, Millerhill, sued John Grieve, Bank Park, near Tranent, for damages for the death of his son. The case was tried before Lord Ormisdale at last July sittings, on the following issue:—

“Whether, on or about 8th January 1867, the deceased Archibald Hunter, when in the employment of the defender, while propelling a loaded hutch along one of the chambers of a coal-pit belonging to the defender, was killed by falling down the shaft of said coal-pit, owing to check-blocks, or other sufficient means for stopping the said hutch, not being provided, through the fault of the defender, to the loss, injury, and damage of the pursuer?”

Damages laid at £500.

The jury returned a verdict for the pursuer, and assessed the damages at £64.

J. C. SMITH, for defender, moved for a rule. He cited *Cook v. Bell*, 28th Nov. 1857, 20 D. 137, op. of Lord Colonsay, 143; and *M'Naughton v. Caledonian Railway Company*, 17th Dec. 1858, 21 D. 160.

LORD PRESIDENT—The question in this case is whether the death of Hunter was caused by the fault of the defender, and the ground of fault which is suggested in the issue is the want of a check-block, or other sufficient means for stopping the hutch which the deceased was propelling along the chamber leading into the main road or incline. Now, the jury having found for the pursuer, it has been contended by the defender that, on two grounds mainly, the verdict is against evidence. In the first place, it is contended that there was no fault on the part of the defender, or evidence of any negligence on his part, leading to the death of the deceased. And, in the second place, it is contended that, supposing there was some negligence on the part of the defender, there was also some negligence or recklessness on the part of the deceased, contributing materially to bring about his death. I am not for disturbing the verdict on either ground. I think there was evidence of negligence to go to the jury, evidence of a kind suitable for their consideration. The work in which Hunter was engaged involved considerable risk. That was so from the very nature of the work, which fell sometimes to be performed by men accustomed to it, and sometimes by persons coming newly to it and knowing nothing of the way of working. Looking to the position of the pit, and the way of working, it is difficult to say that it was not part of the duty of the master to provide some precautions for preventing this accident. Various precautions were suggested; the jury had them before them, and they have come to the conclusion that there was some negligence on the part of the defenders. It is not necessary for the Court to say whether they agree exactly with the jury; but, it being a jury question, if I were doubtful, I should hold that to be a sufficient reason for not granting the rule.

As to the other point, that the deceased contributed in some material way to produce his own death, we must assume, and, indeed, it was conceded by the defender, that, so far as the law is concerned, the case was quite properly left in the hands of the jury by the presiding judge, with directions in accordance with *Macnaughton*. The jury were told that, even assuming there was some negligence on the part of the defender, yet if it was

proved that the deceased materially contributed to the result by his own negligence, the verdict must be for the defender. The case being left to them with that direction, they had before them evidence both ways as to recklessness on the part of the pursuer, and it was just that kind of balancing between the two cases which was proper for a jury to determine. I have no doubt on this point any more than on the other. I am satisfied with the verdict of the jury, for it was a verdict of a jury on a body of evidence not very clear either way, and it is not for us to interfere. I am therefore for refusing the rule.

The other judges concurred.

Rule refused.

Agent for Defender—Alexander Stevenson, W.S.

Wednesday, January 8.

MILNE HOME AND OTHERS v. ALLAN AND OTHERS (EYEMOUTH HARBOUR TRUSTEES).

Harbour—Eyemouth Harbour Improvement Acts 1797 and 1839—Ballast—Sea-shore. The Eyemouth Harbour Trustees held to have no right of property in the harbour, but a right of administration only, not entitling them to excavate the *solum* of the harbour for the purpose of selling the materials excavated as ballast.

This was an action raised by Mrs Milne Home of Wedderburn, proprietrix of the lands and barony of Eyemouth, with consent of her husband David Milne Home of Wedderburn, and by certain other parties, proprietors of heritable property in Eyemouth, against Thomas Allan and others, trustees acting under the Act 2 Vict., c. 36 (an Act for more effectually repairing, improving, and maintaining the harbour of Eyemouth, in the county of Berwick).

The pursuer, Mrs Milne Home, is heritable proprietrix of "all and whole the lands and barony of Eyemouth, with the town, port, and harbour of the same, comprehending therein the lands and others contained in the ancient infeftments thereof," and further, "all and whole the lands of Eyemouth, Loanhead, as also the said burgh of barony and town of Eyemouth, with the port and harbour of the same, wherever the sea ebbs and flows," &c. In virtue of her Crown charter and sasine, the pursuer alleged that she, and her predecessors, as proprietors and superiors of the barony and of the town, port, and harbour of Eyemouth, have always exercised all the rights and privileges therein stated; and, in particular, (1) right of port and harbour, under which they levy rates and dues on vessels and boats frequenting the port and bay; (2) right to cut and carry away sea-ware or tangle; and (3) right to erect dwelling-houses and other buildings on the shore of Eyemouth Bay and to erect bulwarks for the protection of these buildings against the encroachments of the sea, between high and low water-mark. Moreover, the pursuer and her predecessors, as superiors of the barony of Eyemouth, have, in virtue of their said rights and titles, invariably claimed and exercised a right of property in the sea-shores of the said barony, and that right has been acknowledged and allowed by the feuars and inhabitants of the town and parish, so that when gravel, sand, or stones are wanted from the shore, the superior is applied to for permission to take them, and, on payment of one penny sterling per cart-load, permission is generally granted.

Mrs Milne Home is also proprietrix of certain houses along the beach. The other pursuers are also proprietors of houses on the beach. For some time past, they alleged, considerable quantities of sand and gravel had been removed from Eyemouth beach. The pursuers, from time to time, obtained interdict against various parties so offending. One of these parties defended himself on the ground that he had the authority of the defenders, who maintained a right to take sand and gravel for repairing the harbour works, or for ballast, and, in a correspondence which ensued, the defenders made that claim. This removal of sand and gravel, the pursuers alleged, was productive of great damage to their property. The conclusions of the action were "to have it found and declared that the said defenders, as trustees foresaid, have no right, and are not entitled, either by themselves, or by others acting under their authority or on their behalf, to dig, remove, or carry away sand, shingle, gravel, rocks, stones, or other natural substances or materials, from the sea-beach or sea-shore of the bay of Eyemouth, extending from the mouth of the harbour of Eyemouth northward to the Fort of Eyemouth, and they ought and should be prohibited and interdicted from doing so now and in all time coming."

It appeared that in 1797 an Act was passed for repairing, improving, and maintaining the harbour of Eyemouth. The preamble of the Act ran thus:—"Whereas the port and harbour of Eyemouth, in the county of Berwick, is a place of considerable trade, particularly for the importation of wood, coal, and lime, and is the only port within the county for the exportation of corn or other commodities; and is of singular advantage to the trade and shipping upon the coast, by being of easy access in stormy weather, and so situated that ships taking shelter there can sail at all times and in all winds when it is safe to go to sea: And whereas considerable sums of money have been raised from time to time by subscription, and expended in making two piers, and improving the harbour, the benefit of which cannot be secured to the subscribers or to the public unless a fund be provided for keeping it in repair, and enlarging and improving, when necessary, the piers and quays, and scouring, cleaning, and deepening the harbour, and rendering it more safe and convenient for the trade and shipping." Trustees were appointed, with power to levy dues, to appoint a harbour-master, &c.

In 1839 another Act was passed (2 Vict., c. 36), the preamble of which bore that "Whereas an Act was passed in the 37th year of the reign of his Majesty King George the Third, intituled 'An Act for repairing, improving, and maintaining the harbour of Eyemouth, in the county of Berwick,' by which certain trustees were appointed for carrying into effect the purposes thereof; and whereas the trustees appointed by and under the powers of the said recited Act have proceeded to put the same into execution, and considerable improvements have been made upon the said harbour under the powers by the said recited Act granted; and whereas the trade and shipping of the said port and harbour of Eyemouth have materially increased since the passing of the said recited Act, and the said harbour, from its situation, is of great public utility in affording shelter to all vessels resorting thereto; and whereas the powers and authorities given and granted by the said recited Act have been found inadequate to the present circumstances of the said port and harbour, and it would be of great advan-